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CJEU in OSA: a victory for right holders against free use and of CMOs against the European Commission?

Sylvie Nérisson (Max Planck Institute for Innovation and Competition) · Sunday, September 7th, 2014

"The answers from Luxembourg were much awaited not only due to the questions being interesting as such, but also because academia, the European Commission and the CJEU do not see eye to eye on these currently highly debated issues."

In response to questions lodged by a Czech court (Krajský soud v Plzni) in a preliminary ruling procedure (C?351/12), the Court of Justice of the European Union decided earlier this year that there is no flexibility in the interpretation of the Infosoc directive (2001/29/EC) regarding limitations and exceptions to exclusive rights (points 40-41) and that the statutory monopoly position of a CMO complies with the requirements of the Services directive (2006/123/EC) and the freedom to provide services (art. 56 TFEU).

The decision also further specifies the scope of the act of "communication to the public" protected by art. 3(1) of the Infosoc directive (cf. points 23-36; for a detailed comment in French, see here) and maintains its meanwhile classical position regarding tariffs and the application of art. 102 TFEU thereto (cf. Tournier and Lucazeau 1989 cases, and STIM C-52/07 2008 case), leaving it to national courts to assess the fairness of tariffs set by CMOs. Readers interested in the details of the case and questions will find them in points 1 to 21 of the decision and here and here.

The answers from Luxembourg were much awaited not only due to the questions being interesting as such, but also because academia, the European Commission and the CJEU do not see eye to eye on these currently highly debated issues.

Concerning the way to implement the exceptions and limitations of the Infosoc directive, academics have repeatedly spoken in favour of a flexible reading of the three step test (cf. among others the MPI Declaration for "A Balanced Interpretation of the Three-Step Test in Copyright Law", art. 5.5 of the Wittem Code and the IViR report.

The applicability of the Services Directive to CMOs

The second itch of this case is the question of the applicability of the Services Directive to CMOs. The main issue of this question is as follows: if art. 16 of the Services Directive applies to CMOs, any CMO legally established in a Member State should be able to contract with any users of the whole EU. Consequently a French CMO could compete with German CMOs for granting a licence to a German bar playing music, although only German law would be applicable to the music

exploitation in the German bar and only German CMOs would have to comply with the strict German law applicable to CMOs (requiring in particular an administrative authorization to be active as a CMO and the duty of the CMO to deal with right holders and users).

The supervision of CMOs would become an even worse nightmare than it is now (the supervision would only be effective in the State of establishment and supervision offices could then have to judge according to any of the 28 national copyright laws) and the competition among CMOs would be biased (see points 19-24 of the comments of the MPI on the directive proposal).

However, the European Commission only has eyes for the single Market and the enhancement of competition. This appeared in its proposal for a directive about collective management (COM(2012) 372) where it stated that the Services directive applies to CMOs (cf. recital 3 of the directive proposal and point 1.4 of its explanatory memorandum.

The answers of the CJEU

Let us now have a quick but closer look at the answers of the CJEU on these dissenting opinions.

Regarding the compatibility with the Infosoc directive of the Czech exception for thermal SPAs, the sole observation that visitors of a health resort cannot be considered equivalent to handicapped persons (cf. art. 5(3)(b) directive 2001/29) together with recital 32 of the Infosoc directive suffice to understand that art. 23 of the Czech Copyright law contradicts European law.

The value of the answer to this question is in its clear statement that the list of exceptions in the Infosoc directive bears no analogical interpretation to cases not mentioned under art. 5 (points 38-41) and that the three-step test cannot be deemed a source for new exceptions or limitations to the exclusive rights of art. 2 and 3 of the directive (point 40).

The question regarding the monopoly situation of the Czech CMO seemed more open. The Court firstly goes along its case law and states that the services provided by CMOs to users are services within the meaning of both art. 4(1) of Directive 2006/123 and art. 56 f. TFEU (points 58-63).

However, as CMOs provide services related to copyright and related rights, art. 16 – the leading provision – of the so-called “Bolkestein directive” does not apply to CMOs (points 64-66). The wording of the court in the three points related to this question is just as simple for any reader as it may be offensive to the European Commission who stated the exact opposite in its working document preparing the directive about collective management.

The offense seems especially bitter since in the 21 decisions of 12 April 2013 in the so-called CISAC case (T-442/08 et al.) – also dealing with competition law and the territorial schemes of collective management of copyright – the CJEU already openly and pedagogically contradicted the position held by the European Commission.

The Court further examines the interface of CMOs’ territorial monopoly on the one hand and the freedom to provide services within the Union on the other hand. The cross border feature (required by art. 56 TFEU) of the case is the fact that Czech law prevents Czech users from benefitting from the services provided by CMOs established in other Member states (points 67-68).

This hindrance is a restriction on the freedom to provide services (point 69). But the protection of IPR “constitutes an overriding reason in the public interest” (point 71) and the granting of a

“monopoly over the management of copyright in relation to a category of works in the territory of the Member State concerned” is considered by the Court as “suitable for protecting IPR, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory” (point 72).

In assessing whether a statutory monopoly is indeed necessary in order to attain the objective of protecting IPR, the Court follows the Tournier decision of 1989, depicting collective management of copyright, the territoriality of copyright enforcement and the reciprocal representation system as „necessary evils“, at least as long as no better system is found (points 72-79).

Obviously no better system has been found but closer attention or consideration of digital and online facilities would have made the decision more solid. The Court then concludes that „Article 56 TFEU must be interpreted as not precluding such legislation“ (point 79). Advocate General Sharpston was more subtle in her opinion delivered on 14 November 2013 (cf. points 65 to 83 of her opinion.

This decision seems a victory for right holders against free use and of CMOs against the European Commission. It nevertheless reveals the blatant gap between academic positions and the closed approach of exceptions and limitations on the one hand, as well as the rift between the European Commission and the CJEU in several occurrences related to CMOs, competition law and territoriality on the other hand. Pessimists will see here an absurd disputation among dogmatic sophists; optimists a timely call on the legislator for clarifications that could be done within the planned review of the Infosoc directive and the expected white book following the public consultation of last winter.

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